

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF PUERTO RICO

3                   UNITED STATES OF AMERICA,

4                   Plaintiff,

5                   v.

CRIMINAL NO. 91-299 (RLA)

6                   JOSE S. FORTY ESTREMERA,

7                   Defendant.

8                   **ORDER GRANTING DEFENDANT'S MOTION FOR RESENTENCING**

9                   The Court has before it defendant JOSE FORTY ESTREMERA's Motion  
10 to Reduce Sentence (docket No. 1653), which the Government has  
11 opposed (docket No. 1654).<sup>1</sup> After careful consideration of the  
12 arguments asserted in the pleadings, the Court GRANTS defendant's  
13 motion to resentence for the reasons set forth below.

14                   BACKGROUND

15                   The details of this case can be gleaned from United States v.  
16 Levy Cordero, 67 F.3d 1002 (1<sup>st</sup> Cir. 1995); cert. denied, sub nom.  
17 Forty Estremera v. United States, 517 U.S. 1162 (1996).

18                   JOSE FORTY ESTREMERA was convicted and sentenced on September  
19 10, 1993 of one count of conspiracy; two counts of importing  
20 marijuana; two counts of possessing marijuana with intent to  
21 distribute; ten counts of importing cocaine; ten counts of possessing  
22 cocaine with intent to distribute; and one count of attempting to  
23 import cocaine, and aiding and abetting, all in violation of  
24 21 U.S.C. §§ 846, 841(a)(1), 963, 952 and 18 U.S.C. § 2.

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<sup>1</sup> See also Defendant's Reply (docket No. 1655).

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3 Pursuant to the then applicable United States Sentencing  
 4 Guidelines (USSG), the Presentence Report (PSR) reached a base  
 5 offense level of 42 due to a drug quantity greater than 1,500  
 6 kilograms of cocaine and imposed adjustments for his supervisory role  
 7 in the conspiracy and obstruction of justice pursuant to USSG  
 8 § 3B1.1(b) and 3C1.1, respectively. An adjusted offense level of 47  
 9 combined with defendant's criminal history Category of I yielded a  
 10 guideline range which mandated a sentence of life imprisonment.

11 The Court adopted the recommendations of the PSR and sentenced  
 12 FORTY ESTREMERA, then 32 years of age, to life in prison. At  
 13 sentencing, the Court noted its misgivings about the sentence it was  
 14 about to impose:

15 The Court finds this case in particular distressing  
 16 for him personally. The Court has sentenced many  
 17 individuals over a period of years, but finds it  
 18 particularly distressing because of the fact that it  
 19 involved so many individuals, many of whom, if not most,  
 20 came from good family backgrounds. They were not criminals  
 21 in the ordinary sense of that word. And that's why I  
 22 respond, psychologically, to Mr. Inserni's comments that  
 23 his client is not a murderer,<sup>2</sup> because before the  
 24 guidelines when sentencings were imposed these sort of  
 25 things were taken into account, the fact that an  
 26 individual, you know, was not the type of person who was  
 killing people, for which a life sentence is the normal  
 response. However, the people by way of the Congress has  
 deemed it, in its wisdom, to view the narcotic trade as

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23       <sup>2</sup> "He is not a murderer. And murderers get life sentences, Your  
 24 Honor, you know. Rapists. And I'm not saying that--Your Honor, drug  
 25 smugglers should also be punished. Okay. I'm not saying they  
 26 shouldn't, but I'm just saying Mr. Jose Samuel Forty Estremera, as an  
 individual, is not the type of person that should [sic] come out of  
 prison in a casket." (Sentencing hearing transcript, September 10,  
 1993, p.18)

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2 something completely heinous and as affecting the very  
 3 fabric of society and indeed killing people. We've heard  
 4 and read many times about overdoses. So, there is a  
 killing in that sense, although indirect.

5 I'm sure Mr. Forty would be the last person in the  
 world to go up to a person and inject him with an overdose  
 6 of cocaine and kill him. I don't believe he would ever  
 think of doing that.

7 . . .

8 In any event I don't want to make a big speech about  
 9 this thing. I just want to tell you that I, as a judge,  
 10 under the sentencing guidelines have very little power with  
 respect to sentencing. I have to make findings. I've made  
 11 my findings under the law. I made them as fair as I could.  
 We've had motions. We've had hearings. We've had  
 12 testimony. And under the law and good conscious [sic] I've  
 had to make the rulings that I've had to make. And based  
 13 on that, I had to apply or have to apply the guidelines as  
 written.

14 (Sentencing hearing transcript, September 10, 1993, pp. 26-27).

15 One year after FORTY's sentence, the United States Sentencing  
 16 Commission lowered the maximum drug-quantity-determined base offense  
 17 level from 42 to 38. USSG App.C. Vol. I, Amendment 505 (Nov.  
 18 2006) (amendment effective Nov. 1, 1994).<sup>3</sup> In 1995, the Commission  
 19 made Amendment 505 retroactive by including it in the list of  
 20 amendments that authorize a reduction in the term of imprisonment as  
 21 a result of an amended guideline range. See USSG § 1B1.10(c) and  
 22 18 U.S.C. § 3582(c)(2).

23 USSG § 1B1.10(a), in pertinent part, provides as follows:

24 (2) Where a defendant is serving a term of  
 25 imprisonment, and the guideline range applicable to that

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26 <sup>3</sup> Amendment 536 made Amendment 505 effective Nov. 1, 1995. We  
 shall refer henceforth only to Amendment 505.

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3           defendant has subsequently been lowered as a result of an  
4           amendment to the Guidelines Manual listed in subsection  
5           (c) below, a reduction in the defendant's term of  
6           imprisonment is authorized under 18 U.S.C. § 3582(c)(2).

7           In turn, 18 U.S.C. § 3582(c)(2) provides as follows:

8           **(c) Modification of an imposed term of imprisonment** -- The  
9           court may not modify a term of imprisonment once it has  
10          been imposed except that-

11          (1) in any case-

12              (A)---

13              (B)---

14          (2) in a case of a defendant who has been  
15          sentenced to a term of imprisonment based on a sentencing  
16          range that has been subsequently been lowered by the  
17          Sentencing Commission pursuant to 28 U.S.C. s 994(o), upon  
18          motion of the defendant or the Director of the Bureau of  
19          Prisons, or on its own motion, the court may reduce the  
20          term of imprisonment, after considering the factors set  
21          forth in section 3553(a) to the extent that they are  
22          applicable, if such a reduction is consistent with  
23          applicable policy statements issued by the Sentencing  
24          Commission.

25          FORTY has asked us to schedule a new sentencing hearing, order  
26          a new Presentence Report and resentence him as allowed by Section  
1          3582(c)(2). See docket No. 1653. Defendant also entreats us to  
2          apply United States v. Booker, 543 U.S. 220 (2005) in his  
3          resentencing. See defendant's reply, docket No. 1653 at p.2 ("The  
4          question presented here is: whether the U.S. vs.[sic] Booker  
5          requirement that the district court treat the United States  
6          Sentencing Guidelines as advisory applies to the resentencing of  
7          petitioner pursuant to 18 U.S.C. § 3582(c)").

8          In its Response, the United States acknowledged that the  
9          application of Amendment 505 is in order. See Government's response,  
10         docket No. 1654 at p.4. ("It is true that application of amendments

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3       505 and 536 would reduce Forty's base level under USSG § 2D1.1 by  
4       four levels, from 42 to 38."). Nonetheless, it argued that FORTY's  
5       offense level at resentencing would not change because application of  
6       the adjustments for supervisory role and obstruction of justice  
7       totaling five levels in accordance with sections 3B1.1 and 3C1.1,  
8       would, in any event, yield an adjusted guideline range of 43, which  
9       range would still call for life imprisonment according to the U.S.  
10      Sentencing Guidelines' Sentencing Table. This position misinterprets  
11      defendant's argument, who in essence is asserting that when this  
12      court reconsiders his sentence pursuant to § 3582(c)(2) -- in a  
13      proceeding that occurs solely because the Sentencing Commission  
14      lowered the applicable sentencing range -- the court should have  
15      discretion to impose a non-guidelines sentence. See, e.g., United  
16      States v. Hicks, 472 F.3d 1167, 1171 (9<sup>th</sup> Cir. 2007).

17           DISCUSSION

18       1. Applying Booker is in accord with the requirement that courts  
19       apply the current version of the Sentencing Guidelines in effect  
20       on the date of resentencing.

21       It is well settled that absent an *ex post facto* problem, the  
22       district court must apply the version of the Sentencing Guidelines in  
23       effect on the date of resentencing. United States v. Mateo-Espejo,  
24       426 F.3d 508, 510, Note 1 (1<sup>st</sup> Cir. 2005) (citing United States v.  
25       Harotunian, 920 F.2d 1040, 1041-42 (1<sup>st</sup> Cir. 1990)). This echoes the  
26       policy statement in the Guidelines Manual, that "[t]he court shall  
use the Guidelines Manual in effect on the date that the defendant is

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3      sentenced[,] unless doing so would violate the *ex post facto* clause.  
4      USSG § 1B1.11(a) & (b)(2).

5            Here, Booker's advisory regime will be the "version of the  
6      Sentencing Guidelines in effect" on the date of Mr. Forty's  
7      resentencing. These Guidelines will necessarily include judicial  
8      interpretations by the Supreme Court, of the "constitutional  
9      requirement that creates fundamental change" to the legal framework  
10     in question; a requirement of such magnitude that it rendered the  
11     Guidelines advisory only. Booker, 543 U.S. at 248. Therefore, an  
12     imposition of a Guidelines sentence here without applying their newly  
13     advisory role would be violative of the established principle that  
14     the Guidelines as they exist at the time of resentencing is the  
15     version to be applied.

16            2. Booker applies to § 3582(c)(2) resentencing.

17            The Supreme Court in Booker explicitly stated that "as by now  
18     should be clear [a] mandatory system is no longer an open choice"  
19     Booker, 543 U.S. at 263. Moreover, Booker emphasized that the  
20     Sentencing Guidelines could not be construed as mandatory in one  
21     context and advisory in another: "[W]e believe that Congress would  
22     not have authorized a mandatory system in some cases and a non-  
23     mandatory system in others, given the complexities that such a system  
24     would create. Id., at 266. Indeed, district courts are now endowed  
25     with the discretion to obviate Application Note 2. of Section  
26     1B1.10(b) of the Guidelines which states that:

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[i]n determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. **All other guideline application decisions remain unaffected.**

(emphasis added).

Therefore, since Booker excised the statutes that made the Guidelines mandatory and mandatory guidelines no longer exist, this Court is free to resentence FORTY accordingly. See, e.g., United States v. Hicks, 472 F.3d 1167, 1171-72 (9<sup>th</sup> Cir. 2007) ("Booker... provides a constitutional standard which courts may not ignore.... [T]o the extent that the policy statements are inconsistent with Booker, the policy statements must give way"). Cf. Cirilo Muñoz v. United States, 404 F.3d 527, 533, n.7 (1<sup>st</sup> Cir. 2005) (noting that several courts of appeals have said that the advisory guidelines regime is to be used after Booker in resentencing even when the remands for ressentencing are not caused by Booker error).

This Court is mindful that Booker does not mean that judges are now free to impose any sentence they want and that while Booker has increased a sentencing court's discretion, that discretion is not without limits. Therefore, at defendant's ressentencing hearing, we will begin by calculating the applicable guideline range. Once that is established, we will evaluate the factors set forth in 18 § 3553(a) to determine whether or not a guideline or non-guideline sentence is warranted. See, United States v. Gilman, 478 F.3d 440, 444 (1<sup>st</sup> Cir. 2007) (citing United States v. Jimenez-Beltre, 440 F.3d

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514, 518-19 (1<sup>st</sup> Cir. 2006) (*en banc*) and United States v. Thurston, 456 F.3d 211, 215 (1<sup>st</sup> Cir. 2006).

Having determined that MR. FORTY is eligible for resentencing pursuant to 18 U.S.C. § 3582(c)(2)<sup>4</sup> and further eligible to the application of the Booker advisory regime to his sentence, it is hereby ORDERED that the U.S. Marshal shall transfer the person of JOSE S. FORTY ESTREMERA to this jurisdiction **no later than August 17, 2007**, for resentencing by this Court.

It is FURTHER ORDERED that the U.S. Probation Office shall prepare an updated Presentence Report **no later than August 27, 2007**, which shall set forth the status, conduct, and past history of defendant JOSE FORTY ESTREMERA from the time he came under the supervision of the Bureau of Prisons.

A SENTENCING HEARING is hereby scheduled for **September 17, 2007**,  
**at 10:00 a.m.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 1<sup>st</sup> day of August, 2007.

S/Raymond L. Acosta  
RAYMOND L. ACOSTA  
United States District Judge

<sup>4</sup> Defendant previously filed a motion to recall the mandate of the Court of Appeals (see docket No. 1649 and government's opposition, docket No. 1652). In light of our decision today, we do not reach the merits of this motion.